Honorable Robert J. Bryan

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

Angela Kee, et al. Plaintiffs, v. Evergreen Professional Recoveries, Inc. Defendant.	No. C09-5130 RJB *REPLY* TO PLAINTIFF KEE'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE

I.
MOTION TO STRIKE AND LIMITED WAIVER

A. UNSUPPORTED "FACTS" SHOULD BE STRICKEN

Kee's Memorandum begins with a section entitled "Brief Statement of Facts"; the section contains three paragraphs of allegations from the Complaint, the only cites given are to the Complaint. Dkt. #16, pgs 2-3. Kee does not submit an affidavit or declaration to support her Memorandum. Allegations are not "facts" where such are not supported by any

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declaration of personal knowledge. ER 602. In the context of summary judgment, the non-moving party cannot simply rely upon the allegations in the pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L.Ed. 2d 265 (1986); CR 56(e). Thus, the 'Statement of Facts' should either be stricken, or not considered as evidence in opposition to Defendant's Motion.

B. HEARSAY WITHIN DECLARATION

Toward the end of paragraph 3 of the "Statement of Facts", it is argued that the "omission (of the FDCPA claim). . . was corrected on June 17, 2009, with the bankruptcy trustee's knowledge and assent." Dkt. #16 at pg 3. The only cite given for this assertion is counsel's declaration, (Dkt. #16-2) which states at paragraph 7:

> Between June 17, 2009 and June 24, 2009, Ms. Kee's bankruptcy attorney, bankruptcy trustee, and I, communicated several times to amend Ms. Kee's bankruptcy petition to both disclose her FDCPA claims and use the remaining exemptions to protect them from becoming part of the bankruptcy estate.

Decl of Counsel, Dkt. #16-2, pg 1.

This portion of counsel's declaration is necessarily founded upon hearsay and furthermore the allegation that the trustee "assented" to this course of conduct is without support. ER 802. Paragraph 7 of the Declaration should be stricken as to allegations outside of counsel's personal knowledge.

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C. LIMITED WAIVER OF ATTORNEY-CLIENT PRIVILEGE

In Counsel's declaration, he states:

> On or around August 29, 2008, Ms. Kee's bankruptcy file with Legal Helpers was noted to reflect that Ms. Kee had potential claims for violations of the FDCPA. The notation directed Ms. Kee's bankruptcy attorney to contact her FDCPA attorney's (sic) when preparing Ms. Kee's bankruptcy petition.
>
> On February 13, 2009, Ms. Kee's bankruptcy attorney filed her Chapter 7 bankruptcy petition without conferring with Ms. Kee's FDCPA attorneys.

Dkt. #16-2, pg 1, paragraph 2-3

Offering an attorney's testimony concerning matter learned in the course of his employment waives the attorney-client privilege. 8 J. Wigmore, Evidence 2327, at 637-38 (rev. ed. 1961).

The attorney-client privilege is waived when the privileged information is disclosed to a third party, *U.S. v. Agnello*, 135 F.Supp.2.d 380, 382 (E.D.N.Y. 201). *United States v. Mendelsohn*, 896 F.2d 1183 (C.A.9 (Cal.), 1990). Here, the waiver was made by counsel, not Kee, but the effect is the same. Voluntary disclosure of work product to an adversary waives the attorney-client privilege. See *Salomon Bros. Treasury Litig. v. Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2nd Cir. 1993) (citing *United States v. Nobles*, 422 U.S. 225, 239; *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982)). Privileged communications disclosed to any third party destroy the confidentiality upon which the privileged is promised. *XZY Corp. v.*

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United States (*In re Keeper of Records)*, 2003 U.S. App. LEXIS 21388 (1st Cir. 2003) (citing, 2 Paul R. Rice, Attorney-Client Privilege in the U.S. §9:79, at 357 (2d ed. 1999). Communications between Kee's FDCPA counsel and her Bankruptcy counsel with regard to Kee's FDCPA claims are no longer privileged.

II.
REPLY

A. KEE CANNOT RELY ON INADVERTENT ERROR

1. No Evidence from Ms. Kee

Plaintiff Kee argues that judicial estoppel should not apply to bar her claims because the failure to list them was inadvertent error. (Dkt. #16 at pg 4). As an initial matter, there is no declaration from Ms. Kee filed in support of the "inadvertent error" allegation. The only declaration filed, is the one from Mr. Meier, Kee's FDCPA counsel.

However, the relevant inquiry is as to the *debtor's* knowledge and motives.

> A debtor's failure to list a legal claim in bankruptcy is 'inadvertent' only when, in general, the debtor either lacked knowledge of the undisclosed claim or had no motive for its concealment.

McFarling v. Evaneski, 141 Wn.App. 400, 405, 171 P.3d 497 (2007) (emphasis added); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1287 (11th Cir. 2002).

Counsel cannot testify as to his client's state of mind. Fed. R. Ev. 602; 802. As there is no declaration from Ms. Kee, Defendant's Motion for Summary Judgment should

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be granted.

2. Knowledge of Kee

The only competent evidence before the Court as to Kee's knowledge are the following undisputed facts:

-Ms. Kee knew she had an FDCPA claim for which she demanded $10,000 in September of 2008;

-In February, 2009 she filed her Chapter 7 Petition, did not disclose a $10,000 claim, and declared under oath that she had exempt assets of $0.00 and no assets other than those listed;

-Between March and April the Trustee made a diligent inquiry into the financial affairs of Ms. Kee and found no assets other than those listed in the Petition;

-In June the Bankruptcy court, based on the Trustee's Report of No Distribution, granted the debtor a discharge, approved the Report, closed the case and discharged the Trustee from further duties;

-Defendant's sent a letter to Kee's counsel requesting dismissal;

-Kee then filed, through counsel, Amended Schedules which listed her FDCPA claim with a value of $3,000

Dkt. # 15 and Exhibits attached thereto.

While it is argued that "inadvertent error" is to blame for the FDCPA claim not being

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listed in the Chapter 7 petition, there is no explanation for why the claim was not later disclosed. Four months passed after the Petition was filed, during which time there was a 341 meeting of creditors and a diligent inquiry by the Trustee into Ms. Kee's financial affairs. [see Dkt.#15, Exhibit 3, pg 3 (Bankruptcy Petition #09-40947PBS, Trustee's Report)]. He found $0.00 exempt assets.

Moreover, there is no contrary evidence of the Trustee's knowledge because counsel cannot testify for the Trustee. The Bankruptcy court relied on the Trustee's Report when granting a discharge and closing the case. It has not been reopened.

3. Motive for Concealment

Where a debtor derives a benefit from nondisclosure of a claim, judicial estoppel bars recovery on the claim; Intent to mislead is not an element. *Skinner v. Holgate*, 141 Wn.App., 173 P.3d 300 (2007); *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn.App.222 at 234, 108 P.3d 147 (2005). In *Skinner*, the court described the debtor's Chapter 7 discharge as the benefit derived by Mr. Skinner, and that his motive to conceal his claim was "obvious" *Skinner* at 854.

It is noteworthy that the court in *Skinner* was unpersuaded by his "inadvertence error" argument, despite the fact that Mr. Skinner was a pro se debtor and claimed he was not familiar with the concept of contingent or unliquidated claims and had been assisted by a

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paralegal in filling out the forms. *Id.* at 853.

As in *Skinner*, Kee's motive to conceal is obvious: nondisclosure of an alleged $10,000 claim while discharging over $19,000 worth of debt. The explanation of "clerical error" is not sufficient to prevent the application of judicial estoppel. *Skinner* at 853-54.

B. AVAILABILITY OF EXEMPTIONS IS IRRELEVANT

McFarling v. Evaneski, *supra*, is instructive on the issue of the relevancy of exemptions. Mr. McFarling argued precisely the same theory as Kee put forth in her response brief: that sufficient exemptions existed to place the claim beyond the reach of her creditors.

Mr. McFarling reasoned that judicial estoppel should not apply to bar his claim because his claim would have fallen within his bankruptcy exemption, therefore the creditors would not have received any portion of the funds. *McFarling* at 407. The court strongly disagreed with his theory, stating:

> The purpose of judicial estoppel is to encourage respect for the court and to protect the integrity of the judicial process . . . it avoids inconsistency, duplicity, and waste of time[.] Whether Mr. McFarling would have had an applicable bankruptcy exemption is irrelevant to our inquiry.

McFarling at 407. (internal citations omitted; emphasis added)

As in *McFarling*, the issue here is Kee's knowledge, contradictory positions, and the benefit she received through discharge of her debts; the argument that she could have

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exempted the FDCPA claim is wholly irrelevant to the estoppel inquiry.

III.
CONCLUSION

The Response Memorandum and Declaration of Kee's Counsel should be stricken in part, based on hearsay and unsupported allegations. Kee has not submitted any competent evidence to support an "inadvertent error" exception to judicial estoppel. Defendant's Motion should be granted.

DATED THIS 14th day of August, 2009.

LUKE, CASTEEL & OLSEN, PSC

/s/ Kimberlee Walker Olsen
Kimberlee Walker Olsen, WSBA # 28773
Attorney for Defendant

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CERTIFICATE OF SERVICE

I, Kimberlee Walker Olsen, certify that on August 14, 2009, I electronically sent, via ECF, true and correct copies of:

1. Reply to Plaintiff Kee's Response to Defendant's Motion for Summary Judgment and Motion to Strike.

to the following:

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/s/ Kimberlee Walker Olsen

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